

1412301 (Migration) [2015] AATA 3845 (17 December 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Anthony McIlwraith
VISA APPLICANTS:	Ms Kunya Summard Miss Jenjira Summard Mr Phiradon Atthewet
CASE NUMBER:	1412301
DIBP REFERENCE(S):	OSF2013/005647
MEMBER:	Hugh Sanderson
DATE:	17 December 2015
PLACE OF DECISION:	Sydney
DECISION:	The tribunal affirms the decision not to grant the first named visa applicant a Prospective Marriage (Temporary) (Class TO) visas. The tribunal does not have jurisdiction in respect of the applications of the second and third named visa applicants

Statement made on 17 December 2015 at 3:22pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration to refuse to grant the visa applicants Prospective Marriage (Temporary) (Class TO) visas under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicants applied for the visas on 25 November 2013. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visas on 17 June 2014 on the basis that the first named visa applicant did not satisfy cl.300.222 of Schedule 2 to the Regulations because the sponsor did not satisfy reg.1.12J as he had sponsored two women previously for Partner visas and the delegate was not satisfied there were compelling reasons affecting the sponsor to approve the sponsorship.

BACKGROUND

4. The first named visa applicant (hereinafter the visa applicant) is a citizen of Thailand and is currently 38 years old. The second named visa applicants are her children. Jenjira is currently 17 years old and Phiradon is currently 13 years old. They were not included in the application for migration to Australia by a partner filed by the visa applicant and the decision by the department does not refer to them.
5. As there is no decision of the department respect of the second named visa applicants, the tribunal does not have any jurisdiction to hear any review concerning those applicants.
6. The review applicant was born in Australia and is an Australian citizen. He is currently 65 years old. The review applicant has seven children from his previous relationships, the youngest being 28 years old.
7. The review applicant has been in previous married and de facto relationships with the following women:
 - Debra Moody, married 6 February, 1974 and divorced 28 March, 1977;
 - Veronica Tanana, married 15 April, 1977 and divorced 1983;
 - Evelyn Moses, de facto relationship between June 1979 and December 1980;
 - Anna Lowa, de facto relationship between May 1981 and March 1991;
 - Crescencia Villegas, married 29 October, 1994 and divorced after she was granted permanent residence in Australia; and
 - Veronica Tanana, married for a second time on 19 February, 2006 and divorced on 4 October, 2012.

8. The review applicant sponsored Crescencia Villegas in 1994 for a Prospective Marriage visa which was granted to her on 1 September, 1994. She was granted a Partner visa and now has the right to reside in Australia. The review applicant claimed his relationship came to an end as he found out that she was in a relationship with another person who she had left in the Philippines. Crescencia Villegas is currently a resident of Australia and is an Australian citizen.
9. The review applicant sponsored Veronica Tanana on 2 October, 2007 for a Partner visa. She was granted a subclass 309 Partner (Temporary) visa on 4 August, 2007 and a subclass 100 Partner (Residence) visa on 23 August, 2011. The review applicant claimed that their relationship ended due to irreconcilable differences. They were divorced on 4 October, 2012.
10. The parties claimed to have first met each other on 14 December, 2010 when the review applicant was in Thailand and met the visa applicant while she was working in her cousins T-shirt shop. A relationship developed after that time and in February 2011 the parties participated in a traditional Buddhist wedding ceremonially in the visa applicant's village.
11. The review applicant's movement records indicated has travelled out of Australia on 19 occasions since 2010, mostly for periods of about two weeks duration and for less than 1 month and 12 days on any one occasion.
12. The visa applicants movement records indicate that she has travelled to Australia as follows:
 - From 30 August, 2013 to 11 November, 2013;
 - From 29 November, 2014 to 25 February, 2015; and
 - From 25 June, 2015 to 21 September, 2015.
13. The department wrote to the review applicant on 9 April, 2014. The delegate noted the restriction in reg.1.20J limited the number of applications to two persons, a minimum of five years apart. It was noted that as the review applicant had sponsored Crescencia Villegas in 1994 and Veronica Tanana in 2007 he did not satisfy this requirement. It was noted that this requirement can be waived if there are compelling circumstances affecting the review applicant. The review applicant was invited to provide a response. Various financial records and submissions were made by the review applicant. In the submissions, the review applicant made the following claims:
 - He had been in a close relationship with the visa applicant since December 2010 when he first met her;
 - He has travelled regularly to Thailand to spend time with the visa applicant and they have also travel to other countries together;
 - If the visa applicant were not able to come to Australia he would feel compelled to go to Thailand at considerable emotional and financial cost to him and his family in Australia including his 82-year-old mother;
 - He is the head of the family business and he intends to work until he is at least 80 years old; and
 - The visa applicant has become a director of one of his companies which is registered in Hong Kong and as a director of other companies in Australia.
14. The delegate who considered the application noted the following issues:

- The provisions of reg.1.20J(1)(a)(i) applied to the review applicant as he had sponsored more than one person who had been granted the relevant permission as the spouse, de facto partner or prospective spouse of the review applicant on the basis of his sponsorship;
- All the review applicant's children are adults and are not dependent upon him;
- The fact that the review applicant has a family business gives him some flexibility;
- The review applicant has business interests outside Australia; and
- Prior to the grant of the subclass 801 Partner (Residence) visa to Veronica Tanana the review applicant was claiming to be in a relationship with the current visa applicant and yet he did not take any steps to indicate that his relationship with Veronica Tanana had come to an end and the review applicant did not advise the department of this change of relationship.

15. The delegate was not satisfied that the circumstances raised by the sponsor provided compelling circumstances affecting the sponsor to waive the reg.1.20J requirement and concluded that the visa applicant did not meet the criteria in cl.300.222. Accordingly the application was refused.

THE HEARING

16. The review applicant appeared before the tribunal on 8 December, 2015 to give evidence and present arguments. The tribunal also received oral evidence from the visa applicant. The tribunal hearing was conducted with the assistance of an interpreter in the Thai and English languages. The review applicant was represented in relation to the review by his registered migration agent who attended the hearing.
17. The review applicant said that he travelled to Thailand in December 2010 at the suggestion of and with his uncle who was married to a Thai woman. He said that he met the visa applicant in her village. He said they had an introduction to her family in February 2011 at a ceremony conducted at her village. He said that they only started a sexual relationship with each other later in the year. He said that his marriage at that time to his wife, Veronica Tanana, was not working out all that well.
18. The tribunal noted that in the application filed by the visa applicant it was claimed that their relationship started in February 2011, six months before Ms Tanana was granted her permanent visa. The review applicant said that he did not contact the department at that time as he was not sure if he was going to stay with Ms Tanana or not. The review applicant said that Ms Tanana was now living in Australia with her daughter. He said that he had decided to remarry Ms Tanana as all his children were now adults and he thought he should try to live with her again. He said that Ms Tanana left him.
19. The tribunal noted the amount of travel the review applicant had done since 2010. He said that he travelled overseas a lot after he started his relationship with the visa applicant. He said that he has not travelled as much recently as she has been given Visitor visas to be able to stay in Australia for three month periods.
20. The tribunal invited the review applicant to provide compelling circumstances affecting him for not imposing the restriction on his sponsorship. The review applicant said that he had found true love with the visa applicant. He said that she was the first woman who truly said that she loved him.

21. The tribunal asked the applicant about his business. He said that three of his children work in the business and they all have plans for expansion of that business. He said that he was the person who had to sign off on everything and that even when he was overseas the children would contact him to ask him about business issues.
22. The tribunal asked what he would do if the visa application was refused. He said that he did not know and he just wanted the visa applicant in Australia so that they could live together. He said that the visa applicant would help him in his business. He said that not having the visa applicant with him was putting stress on him. He confirmed that he had not seen any doctor or health provider for any condition he was suffering due to stress or depression.
23. The visa applicant stated that she first met the review applicant in December 2010. She said that their relationship developed into more than just a friendship when they travelled to Hong Kong together in June 2011. She said the ceremony that was held in her village in February 2011 was a traditional ceremony to show that the review applicant acknowledged his love of her and accepted her as his wife.
24. The visa applicant said that the review applicant did not say that he was married and that the ceremony in February 2011 was to show that he was part of the family. The tribunal asked the visa applicant when she believed the relationship between the review applicant and Veronica Tanana ended. She said that it ended a long time ago. She confirmed that it ended prior to her meeting the review applicant in December 2010 and their starting a relationship.
25. The tribunal invited the visa applicant to provide any compelling reasons affecting the sponsor for not restricting his sponsorship of the application. The visa applicant said the review applicant does not have a wife and he is getting old. She said that he needed her to look after him and also his mother. She confirmed that he had seven children living in Australia.
26. The visa applicant said that she was currently making mats with her mother in their village. The highest education she had was from year 12 in High School. She said that she has not been involved in the review applicant's business and just looks after his house. She said that she wanted to come and live in Australia to look after the review applicant and also his mother.
27. The tribunal explained the process pursuant to s.359AA of the Act. It explained that it would be putting information to the review applicant which would be the reason, or part of the reason, for affirming the decision under review. It would explain why this information was relevant and then invite the review applicant to comment on or respond to that information. If he required more time to comment on or respond to the information he could request an adjournment.
28. The tribunal noted the information provided by the visa applicant which was that the review applicant had ended his relationship with Ms Tanana when they first met in December 2010 and that the ceremony conducted in her village in February 2011 was a recognition of a continuing relationship with each other. This was relevant as it indicated the review applicant had ended his relationship with Ms Tanana at that time and he did nothing to notify the department of the end of that relationship. This would indicate that the review applicant had not provided all information to the department and undermined his claim that there were compelling reasons affecting him to not restricting sponsorship.
29. The review applicant said that he did not know what the ceremony was about and just went along with it. He said that the visa applicant was aware that he was still living with Ms Tanana as his uncle had told her. He said that the visa applicant may have been under a misapprehension or interpreted the situation incorrectly.

30. The review applicant said that his mother lives independently in her own home and a granddaughter (his sister's daughter) who is 27 lives in a unit attached to the house. He said that she had been living there for two years.
31. The review applicant's agent made submissions in support of the application. This included the following:
- The relationship was a long-term relationship now of more than four years;
 - The review applicant has lots of ties in Australia;
 - The review applicant believes that his relationship with the visa applicant is a true and lasting relationship and the most important one of his life;
 - The fact that the review applicant's mother lives in Australia would make it difficult to move overseas; and
 - At the age of the review applicant, this is likely to be his last chance of happiness.
32. For the following reasons, the tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

33. The issue in the present case is whether there are compelling reasons affecting the sponsor so that the restriction in reg.1.20J should not be applied.
34. Regulation 1.20J of the Regulations sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship. Under reg.1.20J, a sponsor is limited to a total, in a lifetime, of two approved sponsorships or nominations that lead to a grant of a partner visa (or entry permit) or a visa (or entry permit) granted on the basis of the domestic violence provisions. If there has been one previous sponsorship or nomination, or if the sponsor was granted a visa or entry permit as a result of *being* sponsored, a period of 5 years must have passed since the date of the earlier visa application. These requirements apply unless the Minister, or the tribunal on review, is satisfied there are compelling circumstances affecting the sponsor: reg.1.20J(2).
35. The expression 'compelling circumstances' is not defined in the legislation. Whether there are compelling circumstances affecting the sponsor is a matter of fact and degree for the tribunal to determine. The tribunal must consider whether the circumstances are such that they evoke interest or attention in a powerfully irresistible way: *Babicci v MIMIA* [2004] FCA 1645 or are 'so powerful that they lead the [tribunal] to make a positive finding that the [provision] should be waived': *Babicci v MIMIA* [2005] FCAFC 77
36. It is not in dispute that the review applicant has been the sponsor of two approved sponsorships for Partner visas. These were his sponsorships of his wife, Crescencia Villegas who was granted a subclass 300 Prospective Marriage visa on 1 September, 1994 and a Spouse visa on 25 March, 1995, and Veronica Tanana who was granted a subclass 309 Partner (Temporary) visa on 4 August, 2008 and a subclass 100 Partner (Residence) visa on 23 August, 2011. Accordingly, the review applicant does not meet the criteria in reg.1.20J(1)(a)(i).
37. Despite the applicant not meeting the criteria in reg.1.20J(1)(a)(i), the tribunal has considered whether the sponsorship should be approved pursuant to reg.1.20J(2) on the basis that there are compelling circumstances affecting the sponsor.

38. The tribunal has not made any critical assessment of whether the parties are in a genuine, continuing and exclusive relationship. The tribunal has accepted at face value the claims made by the parties that they are in a genuine relationship together and the circumstances of that claimed relationship for the purposes of this decision.
39. The criterion in cl.300.216 is that the applicant and the sponsor genuinely intend to live together as spouses. A criterion for any Partner visa application is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. When assessing this, the decision maker is required to look at various aspects of the relationship between the applicant and the sponsor which includes the nature of their commitment to each other and the degree of companionship and emotional support they provide each other and whether they see the relationship as a long term one.
40. The restrictions in the sponsorship for certain visas in reg.1.20J are in addition to the requirements of the visa applicant to otherwise satisfy the criteria for the grant of the visa. Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling circumstance affecting the sponsor for not applying the sponsorship restrictions and approving the sponsorship. If the relationship in itself can be considered a compelling reason for not applying the sponsorship restriction it must be the particular aspects of the relationship which must provide the compelling circumstances for not applying the sponsorship restrictions and not simply the fact that the parties are in a relationship.
41. Inconsistent information has been given as to when the review applicant considered he commenced a genuine relationship with the visa applicant so that they genuinely intended to live together as spouses.
42. There is no dispute that the parties first met each other in December 2010 when the review applicant was holidaying with his uncle. It was claimed by the applicant in a letter he provided to the department that he wished to demonstrate his commitment to her after he returned to Australia after first meeting her by sending her money each week. He then returned to Thailand in February 2011 where they "had a traditional Isaan village ceremonially to show all her extended family we were in a serious relationship". In the statutory declaration the review applicant provided to the department he described this ceremony as "a traditional Buddhist wedding in her village in 2011 as a sign of respect to her family". The visa applicant also gave evidence that she believed that she was in an exclusive relationship with the review applicant from when they first met and that their commitment to the relationship happened during that ceremony, and certainly when they travelled together to Hong Kong in June 2011.
43. At this time, the review applicant was still sponsoring his wife, Veronica Tanana, who was yet to be granted the subclass 100 Partner (Residence) visa. At no stage did the applicant or Ms Tanana contact the department to indicate that their relationship had come to an end or that the review applicant was in a relationship with another person.
44. At the hearing, the applicant denied that he was not in a continuing relationship with Ms Tanana throughout this period. He claimed that despite initiating a relationship with the visa applicant he did not consider his relationship with Ms Tanana as at an end and was simply not sure whether he was going to stay with Ms Tanana or not. This would indicate that throughout the period of the relationship between the visa applicant and the review applicant the review applicant did not display the level of commitment which would be expected of a genuine relationship and that he was not in an exclusive relationship with the review applicant. At best, it may be considered that any commitment to an exclusive relationship with the visa applicant by the review applicant only occurred after his relationship with Ms Tanana had come to an end.

45. The tribunal has considered all other aspects of the relationship. The tribunal is not satisfied, accepting the claims made by the parties, that their relationship has provided any greater devotion or commitment than would be expected if the parties were in a genuine relationship. Although claiming that he is facing stress due to the failure to grant the visa to the visa applicant, there is no medical evidence that the review applicant is so dependent upon the visa applicant that this would provide a compelling circumstance for waiving the sponsorship restriction. The parties have continued to travel to see each other and there is no indication that they would not be able to continue to do this if their relationship is continuing. Although it was claimed that the relationship the review applicant has with the visa applicant is different to all other relationships he has had in the past which have failed, there is no information which would indicate why this would be so.
46. When considering all the circumstances of the claimed relationship between the review applicant and the visa applicant, including the circumstances leading to the start of the relationship, the length of the relationship, the claimed dependence the review applicant has upon the visa applicant and the overall history of the relationship, the tribunal is not satisfied that this provides a compelling circumstance affecting the sponsor which would justify not applying the sponsorship restriction.
47. The review applicant has claimed his business interests and ties he has in Australia provides a compelling circumstance affecting him to justify not applying the sponsorship restriction. The review applicant is the head of the family business. Three of his children work in that business. It was claimed that those children intend to remain in the business and have plans for its expansion. The review applicant stated that when he has travelled overseas his children involved in the business have contacted him to obtain his advice in respect of various aspects of the business. The review applicant has travelled regularly overseas and has been involved in business activities in Hong Kong associated with the business. Documents were provided to the tribunal which indicated the business proposes to expand into Bangladesh. Although currently aged 65 years old, the applicant indicated he intended to continue to work in the business until he was 80 years old.
48. The review applicant has regularly travelled overseas to spend time with the visa applicant as well as being involved in various business activities overseas. Although the applicant claimed his children still relied upon him for advice when they were managing the business in his absence, there is nothing to indicate that the review applicant's children did not properly manage that business and have been successful in doing so. That they are considering expansion of the business indicates that they have plans for its future and have been able to adequately manage that business in the absence of the review applicant in the past. The succession plan for the review applicant, although he stated he intends to work until he is 80 years old, is clearly to have his children take over that business.
49. The tribunal is not satisfied that any of the circumstances of the review applicant's involvement in his business in Australia provides a compelling circumstance affecting the sponsor for not applying the sponsorship restriction. The fact that the applicant has been able to travel overseas regularly over the past four years indicates that he would be able to continue to do so in the future if he should so decide to do so without any adverse consequences for his business or his children's involvement in that business.
50. The review applicant has claimed that as his mother lives in Australia and is elderly this provides a compelling reason for not applying the sponsorship restriction. The review applicant's mother attended the hearing. She appeared, as was stated by the review applicant, as a very healthy person for someone her age. She lives independently with a granddaughter (not a child of the review applicant) living in separate area in the same home. The review applicant's seven children all live in Australia and would be able to provide assistance to their grandmother. No complete details of other relatives of the review

applicant's mother were provided. There is no information that the review applicant's grandmother is or has at any time been in anyway dependent upon the visa applicant or the review applicant for her care or support. The review applicant has travelled extensively overseas and continues to travel regularly overseas. There is no information which would indicate the fact that the review applicant does travel overseas has caused any difficulties for his mother.

51. When all the circumstances of the review applicant's mother are considered, the tribunal is not satisfied that they provide a compelling circumstance affecting the sponsor to justify not applying the sponsorship restrictions.
52. The tribunal has assessed the circumstances of the review applicant both individually and cumulatively. As set out above, the tribunal is not satisfied that any of the individual circumstance claimed by the review applicant provide a compelling circumstance affecting the sponsor which would justify not applying the sponsorship restriction. When considered in combination, the tribunal is not satisfied that the total circumstances of the review applicant provide compelling circumstances affecting him which would justify not applying the sponsorship restriction.
53. As the tribunal has concluded that the applicant does not meet the sponsorship requirement in reg.1.20J(1) and is not satisfied the criteria in reg.1.20J(2) that there are compelling circumstances affecting the sponsor that the sponsorship restrictions should not apply, the visa applicant fails to meet the criteria in cl.300.222.
54. For the reasons above, the tribunal finds the visa applicant does not satisfy the criteria for the grant of the visa.
55. In respect of the second and third named visa applicants, it is noted that they were not included in the application of the first named visa applicant and, as such, no decision was issued by the department in respect of those people. In the hearing, it was acknowledged that it was an error that these two people were included in the review application.
56. As the department did not make any decision in respect of the second and third named visa applicants, the tribunal does not have any jurisdiction in respect of the review applications filed for them.

DECISION

57. The tribunal affirms the decision not to grant the first named visa applicant a Prospective Marriage (Temporary) (Class TO) visas.
58. The tribunal does not have jurisdiction in respect of the applications for the second and third named visa applicants.

Hugh Sanderson
Member